

Atlanta
Beijing
Brussels
Chicago
Frankfurt
Hong Kong
London
Los Angeles
Milan
New York
Orange County
Palo Alto
Paris
San Diego
San Francisco
Shanghai
Tokyo
Washington, DC

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

Barbara L. Johnson

**American Bar Association
Section of Labor and Employment Law
2011 Annual Conference
Toronto, Canada
August 4-7, 2011**

**TYPES OF DAMAGES AVAILABLE IN
EMPLOYMENT CASES**

TABLE OF CONTENTS

	Page
1. MONETARY RELIEF.....	1
(a) Back Pay.....	1
(i) Elements of the Back-Pay Awards.....	1
(1) Wages and salary.....	1
(2) Fringe benefits.....	1
(3) Pre-Judgment Interest.....	2
(4) Negative tax consequences.....	2
(ii) The Period of Recovery for Back-Pay Awards.....	2
(1) Commencement of the Back-Pay Period.....	3
(2) Termination of the Back-Pay Period.....	3
a. Failure to Mitigate.....	3
b. Reemployment.....	4
c. Refusal of an Unconditional Offer of Reinstatement.....	5
d. After-Acquired Evidence of Employee Misconduct or Fraud.....	6
e. Average Tenure.....	6
(iii) Defenses.....	6
(1) Constructive discharge.....	6
(2) Laches.....	6
(iv) Limitations on Back Pay Awards.....	7
(1) Non-Collateral Sources of Income.....	7
(2) Pattern or Practice Claim.....	7
(b) Front Pay.....	7
2. COMPENSATORY AND PUNITIVE DAMAGES.....	8
(a) Statutes Allowing Recovery of Compensatory and Punitive Damages.....	8
(i) Title VII.....	8
(ii) Sections 1981 and 1983.....	9
(iii) The ADEA & the EPA.....	9

**TYPES OF DAMAGES AVAILABLE IN
EMPLOYMENT CASES**

TABLE OF CONTENTS

	Page
(iv) The ADA & The Rehabilitation Act	9
(b) Compensatory Damages	10
(c) Punitive damages.....	11
(d) Defenses	12
(i) Mixed-Motive Defense.....	12
(ii) Good-faith defense	13
(iii) Due process concerns	13
3. INJUNCTIVE & AFFIRMATIVE RELIEF	14
(a) Injunction against the use of specific, unlawful employment practices.....	14
(b) Make-whole remedies	14
(i) Retroactive Seniority	15
(ii) Reinstatement	15
(c) Preliminary injunctions	16
4. ATTORNEY’S FEES.....	17
(a) Who Is a Prevailing Plaintiff?	17
(b) Grounds for Denying Awards for Attorneys’ Fees	18
(c) Prevailing Defendants	18
(d) Calculating Attorney’s Fees Awards.....	19
(i) The Lodestar Method	19
(1) Rates	19
(2) Hours	19
(ii) Adjustments to the Lodestar.....	20
(e) Tax Issues Regarding Awards of Attorney’s Fees	20

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

This paper discusses the types of damages available under Title VII of the Civil Rights Act of 1964, as amended (“Title VII”), the Americans with Disabilities Act (“ADA”), the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“Rehabilitation Act”), the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), the Age Discrimination in Employment Act (“ADEA”), the Equal Pay Act (“EPA”) and the Reconstruction Era Civil Rights Acts (“Sections 1981 and 1983”).

1. Monetary Relief

(a) **Back Pay**

Back pay is available under Title VII, the ADA, the ADEA, the EPA, the Rehabilitation Act, the USERRA, and Sections 1981 and 1983. Once the plaintiff establishes that unlawful discrimination caused her loss, she is entitled to back pay. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (holding that back pay should be denied only in unusual circumstances where the award would frustrate the statutory purpose of eradicating discrimination and making victims whole). Moreover, the Equal Employment Opportunity Commission (“EEOC”) can seek recovery of back pay even when an employee has signed a mandatory arbitration agreement. EEOC v. Waffle House, Inc., 534 U.S. 279, 291, 296-97 (2002) (holding that EEOC can seek victim-specific relief without the alleged victim’s consent although her acceptance of a monetary settlement will limit the EEOC’s ability to recover back pay).

(i) Elements of the Back-Pay Awards

(1) Wages and salary

The plaintiff bears the burden of establishing the value of her lost salary, but the plaintiff is not required to establish the exact dollar amount. See Durham Life Ins. Co. v. Evans, 166 F.3d 139, 156 (3d Cir. 1999) (holding that “uncertainties [in the calculation of back pay] are resolved against a discriminating employer”). The plaintiff may also recover overtime, shift differentials, commissions, tips, cost-of-living increases, merit increases, and raises due to promotion by showing that she would have earned those items absent discrimination. See, e.g., Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1563 (11th Cir. 1986). The back pay award must not be speculative, but rather must be based on reasonable expectations. See Zhang v. Am. Gem Seafoods, Inc., 339 F.3d 1020, 1040 (9th Cir. 2003) (history of bonuses justified award); Neufeld v. Searle Lab., 884 F.2d 335, 342 (8th Cir. 1991) (denying recovery of future bonuses as speculative).

(2) Fringe benefits

Similarly, the plaintiff bears the burden of proof for claims for fringe benefits, such as vacation pay, pension and retirement benefits, stock options and bonus plans, savings plan contributions, cafeteria plan benefits, profit-sharing benefits, and medical and life

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

insurance benefits. The plaintiff must demonstrate her entitlement to and the value of such benefits with reasonable certainty. Vaughn v. Sabine Cnty., 104 F. App'x. 980, 985 (5th Cir. 2004) (a jury may consider the value of employee benefits in making a back pay determination so long as evidence in the record supports a calculation). When the employee would have been obligated to pay part of the cost of benefits, that portion of the cost may reduce the back pay award.

(3) Pre-Judgment Interest

The Supreme Court established a strong presumption that prejudgment interest on back-pay awards should be granted in employment discrimination cases. See Loeffler v. Frank, 486 U.S. 549, 557-58 (1988) (“Title VII authorizes prejudgment interest as part of the back pay remedy in suits against private employers”). However, some courts have declined to award prejudgment interest to the plaintiff who did not comply with procedural rules to preserve the possibility of recovering prejudgment interest. See Bunch v. Bullard, 795 F.2d 384, 399 (5th Cir. 1986) (the plaintiffs’ failure to appeal or cross-appeal from the lower court’s judgment precludes them from challenging a back-pay award that denied prejudgment interest); Goodman v. Heublein, Inc., 682 F.2d 44, 45 (2d Cir. 1982) (prejudgment interest is barred in an ADEA action where the prevailing plaintiff has not moved to alter or amend the judgment within 10 days, as is required by Fed. R. Civ. P. 59(e)).

(4) Negative tax consequences

To receive additional back pay to compensate the increased tax liability of a lump-sum back pay in a single year, the plaintiff need to prove the amount of increased income tax burden. See O’Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 443, 447 (E.D. Pa. 2000) (allowing the recovery of the increased tax liability from the lump sum award of back pay and front pay where expert testimony was provided specifying the award’s tax consequences); Barbour v. Medlantic Mgmt. Corp., 952 F. Supp. 857, 865 (D.D.C. 1997) (denying award due to plaintiff’s failure to provide evidence on difference between taxes paid on lump sum front pay award and amount of taxes that would have been paid had the salary been earned over time).

(ii) The Period of Recovery for Back-Pay Awards

Back pay is generally awarded from the occurrence of the alleged discrimination until the harm suffered by the plaintiff is redressed. See Thorne v. City of El Segundo, 802 F.2d 1131, 1136 (9th Cir. 1986). The plaintiff must demonstrate the amount of economic harm she has suffered as a result of the alleged discrimination. The award of back pay may be denied if the plaintiff would have been separated from her job anyway in the absence of the alleged discrimination.

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

(1) Commencement of the Back-Pay Period

Subject to statutory limits, back-pay liability begins at the point of the employer's illegal act causing the plaintiff to suffer an economic injury. Title VII precludes the recovery of back-pay damages suffered more than two years before the plaintiff filed a charge of discrimination with the EEOC unless she alleged a pattern-or-practice claim. 42 U.S.C. § 2000e-5(g)(1). Alleged failures to promote, denials of transfer, termination, and similar adverse employment decisions are "discrete discriminatory acts" which must be challenged within the applicable statute of limitations, and cannot be considered part of a "continuing violation." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002). Although each discriminatory paycheck constitutes a separate violation of the EPA, the continuing violation doctrine did not permit the plaintiff to recover back pay for discriminatory pay periods outside the applicable statute of limitations period. O'Donnell v. Vencor Inc., 466 F.3d 1104, 1113 (9th Cir. 2006).

However, under Sections 1981 and 1983, a back-pay award is not subject to the two-year limitation applicable under Title VII but subject to the appropriate statute of limitations under state law. See Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 460 (1975); Kornegay v. Burlington Indus., Inc., 803 F.2d 787, 788 (4th Cir. 1986) (three-year North Carolina statute of limitations capped back pay period). Under the ADEA, back pay may be recovered for a period of two years, or three years in the event of a willful violation. 29 U.S.C. § 255.

(2) Termination of the Back-Pay Period

The back-pay accrual period ends on either the date that judgment is rendered or the date that the jury returns its verdict. But the employer may truncate the back-pay accrual period by demonstrating a) the plaintiff's failure to mitigate, b) the plaintiff's reemployment, c) the plaintiff's refusal of an unconditional offer of reinstatement, d) after-acquired evidence of the plaintiff's misconduct or fraud, and e) shorter average tenure of employees in the plaintiff's position.

a. Failure to Mitigate

The plaintiff has an affirmative duty to mitigate lost wages by "us[ing] reasonable diligence" to locate "substantially equivalent" employment, see Ford Motor Co. v. EEOC, 458 U.S. 219, 231 (1982), and her failure to mitigate damages can reduce or completely cancel out a back pay award. 42 U.S.C. § 2000e-5(g) ("interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce the back pay otherwise allowable"); e.g., Landgraf v. USI Film Prods., 511 U.S. 244, 253 n.5 (1994) (reducing back-pay awards by the amount plaintiff could have earned with reasonable diligence).

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

A substantially equivalent position offers similar compensation, promotional opportunities, job responsibilities, working conditions and job status as the position from which the plaintiff has been discriminatorily lost. Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73, 85 (3d Cir. 2009). Although the plaintiff need not accept significantly inferior employment, the plaintiff may not satisfy her duty to mitigate by insisting the identical job with the same compensation. See Ford Motor, 458 U.S. at 231 (1982) (stating that plaintiff “need not go into another line of work, accept a demotion, or take a demeaning position”); Hutchison v. Amateur Elec. Supply, Inc., 42 F.3d 1037, 1067 (7th Cir. 1994) (holding that employee who received an above-market salary has a duty to seek employment at market rate); Walters v. City of Atlanta, 803 F.2d 1135, 1145 (11th Cir. 1986) (finding the plaintiff’s extensive efforts to obtain only the particular position discriminatorily denied the plaintiff are insufficient). Back-pay award may be adjusted to include expenses that plaintiff has incurred in mitigating damages.

The employer carries the burden of establishing the plaintiff’s failure to mitigate by showing that (1) her economic harm could have been reduced or avoided if she had sought suitable employment and (2) she did not exercise reasonable diligence in seeking such employment. E.g., Peyton v. Dimaro, 287 F.3d 1121, 1128 (D.C. Cir. 2002). But when the plaintiff did not make any effort at all to find suitable employment, the employer may not need to show that suitable jobs were available in the appropriate geographic area. West v. Nabors Drilling USA, Inc., 330 F.3d 379, 382, 393-94 (5th Cir. 2003); Quint v. A.E. Staley, 172 F.3d 1, 16 (1st Cir. 1999).

To satisfy her duty to mitigate, the plaintiff must take a proactive approach to obtaining new employment beyond reviewing employment ads in publications. See Dailey v. Societe Generale, 108 F.3d 451, 455 (2d Cir. 1997) (registering with employment agencies, interviewing for open positions, and discussing job prospects with friends and acquaintances satisfies the plaintiff’s duty). The plaintiff who abandons the search for new employment or fails to pursue new employment with reasonable diligence does not satisfy her duty to mitigate, unless she shows that her deficient mitigation efforts are a product of the psychological or economic injuries inflicted by the employer’s conduct. See Fogg v. Gonzales, 492 F.3d 447, 455 (D.C. Cir. 2007) (affirming district court’s conclusion that plaintiff’s failure to find other police work does not constitute his failure to mitigate because the employer’s for-cause termination had made any effort futile).

b. Reemployment

The back-pay accrual period typically ends when the plaintiff obtains a “substantially equivalent” position. If the plaintiff voluntarily resigns or is terminated from subsequent employment for cause, back pay liability may be cut off. See Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 937 (5th Cir. 1996) (holding that the plaintiff was entitled to back pay only up to the point that he found the substantially similar employment but not for the period after he was fired because of excessive absences, excess use of the company phone

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

for personal calls, and conflicts with a coworker). But see Johnson v. Spencer Press of Maine, Inc., 364 F.3d 368, 382 (1st Cir. 2004) (holding that the plaintiff was entitled to back pay regardless of the cause of termination from subsequent employment); Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684, 696 (2d Cir. 1998) (stating that voluntarily quitting a job does not toll the back pay period when it is motivated by unreasonable working conditions or an earnest search for better employment).

Back pay may be further reduced for periods during which the plaintiff is unavailable for work or has voluntarily left the job market. See Thornley v. Penton Publ'g, Inc., 104 F.3d 26, 31 (2d Cir. 1997) (internal citation omitted) (quoting other case stating that back pay should not cover the “period when a plaintiff would have been unable, due to an intervening disability, to continue employment”). For example, in Thornley, the Social Security Administration determined that the plaintiff was unable to work after retrial of his ADEA action. Id. The Second Circuit held that after the onset of his disability, the appropriate remedy for the plaintiff became disability benefits under the employer’s long-term disability plan, not back pay. Id.

The plaintiff’s income in new employment between her separation from employment at the employer and judgment in the case likely reduces back pay awards unless the income could have been earned even if the plaintiff was still in her former position at that time. See Shapiro v. Textron, Civ. A. No. 95-4083, 1997 WL 45288, at *1 (E.D. La. Feb. 4, 1997), aff’d, 141 F.3d 1163 (5th Cir. 1998) (holding that a successful ADEA plaintiff’s back pay award will not be reduced by the receipt of other income from sources that would have been received even if he had not been discharged). The employer must demonstrate the extent of the plaintiff’s interim earnings in order to reduce the back pay award.

c. Refusal of an Unconditional Offer of Reinstatement

The employer may cut off back-pay liability by showing that the plaintiff received an unconditional offer and that the position is substantially equivalent to her former position. See Ford Motor, 458 U.S. at 238-39; Madden v. Chattanooga City Wide Serv. Dep’t, 549 F.3d 666, 679 (6th Cir. 2008) (holding that the reinstatement offer conditioned on the plaintiff’s dropping his complaint against the employer does not cut off back pay liability). The plaintiff’s unreasonable rejection of an employer’s unconditional offer of reinstatement will end the accrual of back pay on the date that the offer is rejected or expires, Ford Motor, ***458 U.S. at 238-39, and it will also preclude the award of reinstatement or front pay. E.g., Lewis Grocer Co. v. Holloway, 874 F.2d 1008, 1012 (5th Cir. 1989); Stanfield v. Answering Serv., Inc., 867 F.2d 1290, 1296 (11th Cir. 1989). To preserve the right to recovery of back pay, the plaintiff then must show that the rejection of the offer was reasonable and justified by special circumstances. Ford Motor, 458 U.S. at 238 & n.7. The absence of retroactive seniority or accrued back pay does not constitute special circumstances that justify a rejection of the valid offer. Id. at 241.

**TYPES OF DAMAGES AVAILABLE IN
EMPLOYMENT CASES**

d. After-Acquired Evidence of Employee Misconduct or Fraud

Back-pay liability ends when an employer discovers sufficient evidence of employee misconduct or fraud that precedes the discriminatory act. See McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 360-61 (1995) (stating that back-pay period should be “from the date of the unlawful discharge to the date the new information was discovered”); Russell v. Microdyne Corp., 65 F.3d 1229, 1240 (4th Cir. 1995) (applying McKennon to after-acquired evidence of misrepresentations in resume and application to limit back pay to the period from the date of the unlawful discharge to the date the new information was discovered). The employer has the burden to show that such misconduct or for the application fraud “was of such severity that the [plaintiff] would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” McKennon, 513 U.S. at 363.

e. Average Tenure

The employer may also reduce back pay by demonstrating that employees in the plaintiff's position typically do not remain with the same employer for long periods of time. E.g., EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 530 (11th Cir. 1990) (limiting back pay to the average tenure of sales employees).

(iii) Defenses

The employer may completely avoid the back-pay liability when the plaintiff (1) did not demonstrate that her resignation constitutes constructive discharge or (2) failed to timely bring the claim.

(1) Constructive discharge

When the plaintiff resigned from or abandoned her position, the plaintiff must satisfy a high bar to show that the alleged discrimination made conditions in the workplace so intolerable that the plaintiff could not reasonably be expected to stay in her job. See Penn. State Police v. Suders, 542 U.S. 129, 134 (2004).

(2) Laches

The plaintiff must promptly bring her claim so that evidence will not deteriorate and the employer can mount an effective defense. See Nat'l Passenger R.R. v. Morgan, 536 U.S. 101, 108-09 (2002).

**TYPES OF DAMAGES AVAILABLE IN
EMPLOYMENT CASES**

(iv) Limitations on Back Pay Awards

(1) Non-Collateral Sources of Income

Social security disability benefit payments, retirement benefits paid by the employer, severance payments, and workers' compensation time loss payments may reduce back pay awards to prevent double recovery by the plaintiff. However, income or other benefits the plaintiff received from source collateral to the defendant cannot reduce the defendant's damages liability. Giles v. Gen. Elec. Co., 245 F.3d 474, 494-95 & n.37 (5th Cir. 2001). Also, courts differ on whether unemployment compensation may reduce a back-pay award. Compare Hare v. H & R Indus., Inc., 67 F. App'x 114, 121 (3d Cir. 2003) (concluding that unemployment benefits should not be deducted from a Title VII back pay award), and Dominguz v. Tom James Co., 113 F.3d 1188, 1191 (11th Cir. 1997) (holding that unemployment benefits should not be deducted from back pay awards under ADEA), with Nottelson v. Smith Steel Workers D.A.L.U. 19806, 697 F.2d 743, 756 (7th Cir. 1981) (offsetting back pay by employer contributions to unemployment compensation fund).

(2) Pattern or Practice Claim

When the number of qualified class members exceed the number of openings lost through discrimination and identifying individuals entitled to relief is not practical, back pay may be prorated among multiple plaintiffs or distributed only to plaintiffs who are reevaluated on a nondiscriminatory basis. See Catlett v. Mo. Highway & Transp. Comm'n, 828 F.2d 1260, 1268 (8th Cir. 1987)

(b) **Front Pay**

Front pay compensates the plaintiff for the future effects of discrimination when reinstatement would be an appropriate, but not feasible, remedy or for the estimated length of the interim period before the plaintiff could return to her former position. See Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 850 (2001); see, e.g., Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73, 87-88 (3d Cir. 2009) (affirming the award of 10-year front-pay to a temporary employee who was not offered a permanent position because of unlawful sex discrimination).

Although reinstatement is generally preferred, front pay may be awarded in lieu of reinstatement when (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts. See, e.g., Abuan v. Level 3 Commc'ns, Inc., 353 F.3d 1158, 1179 (10th Cir. 2003) (holding that the plaintiff should not be forced into an employment relationship with a hostile employer and forego front pay); Salitros v. Chrysler Corp., 306 F.3d 562, 573 (8th Cir. 2002) (finding front pay appropriate when a reinstatement of the plaintiff was illusory because he was unable to return to work as a result of the employer's harassment). In addition, front pay may be appropriate when no comparable

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

position is available or when the plaintiff's approaching retirement makes the front-pay period of short duration. See Whittlesy v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984); Chance v. Champion Spark Plug Co., 732 F. Supp. 605, 610 (D. Md. 1990) (finding reinstatement impracticable and front-pay award appropriate where ADEA plaintiff plans to retire in 1 month).

In determining the amount of the front-pay award, the following factors are considered: (1) the age of the plaintiff; (2) the reasonable amount of time for the plaintiff to obtain a comparable position; (3) the amount of time the plaintiff had worked at the employer or the previous employer(s); and (4) the amount of time the employees in the similar positions had worked at the employer. See Barbour v. Merrill, 48 F.3d 1270, 1280 (D.C. Cir. 1995); see, e.g., EEOC v. HBE Corp., 135 F.3d 543, 555 (8th Cir. 1998) (reducing five-year front pay to one year based on high turnover of predecessors).

Front pay is subject to deductions and cancellation for the same reasons that back pay may be limited. As with back pay, front pay will not be awarded when the plaintiff failed to mitigate damages or unreasonably declined an unconditional offer of reinstatement to her former position. See Vaughn, 104 F. App'x at 986; Lightfoot v. Union Carbide Corp., 110 F.3d 898, 909 (2d Cir. 1997). Or at least front pay liability will be cut off when an employer discovers sufficient evidence of the plaintiff's misconduct or application fraud that precedes the discriminatory act. See McKennon, 513 U.S. at 360-61.

2. Compensatory and Punitive Damages

Compensatory damages are available under Title VII, the ADEA, the ADA, the EPA, and Sections 1981 and 1983.

(a) **Statutes Allowing Recovery of Compensatory and Punitive Damages**

(i) Title VII

Title VII allows plaintiffs in cases involving intentional discrimination to recover compensation and punitive damages. There are caps on the amount of punitive and compensatory damages that may be awarded to the plaintiff for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(3). The amount of the cap varies with the size of the employer—specifically, the number of employees the employer have in each of 20 or more calendar weeks in the current calendar year. The four statutory limits are: (1) \$50,000 for employers of 15 to 100 employees; (2) \$100,000 for employers of 101 to 200 employees; (3) \$200,000 for employers of 201 to 500 employees; and (4) \$ 300,000 for employers with 501 or more employees. 42 U.S.C. § 1981a(b)(3). The cap on damages recoverable under Title VII does not limit front pay, which is not compensatory damages, or recovery under state anti-discrimination statutes. See Pollard, 532 U.S. at 852; Hemmings v. Tidyman's Inc., 285 F.3d

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

1174, 1196 (9th Cir. 2002) (Title VII damages cap inapplicable to \$ 650,000 award of non-economic damages under Washington Law Against Discrimination).

(ii) Sections 1981 and 1983

Compensatory and punitive damages may also be recovered under Sections 1981 and 1983. Smith v. Wade, 461 U.S. 30, 56 (1983); Carey v. Phipps, 435 U.S. 247, 264 (1978); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 460 (1975). There are no statutory caps on the damages applicable to the amount of compensatory or punitive damages that may be recovered under Sections 1981 and 1983. 42 U.S.C. § 1981a(b)(4). Under Sections 1981 and 1983, although injury to reputation, standing alone, does not provide a basis for an action, persons who sustain such injury in connection with adverse employment action may claim compensatory damages. See Carey, 435 U.S. at 264.

(iii) The ADEA & the EPA

Liquidated damages are considered either compensatory or punitive damages, see Shea v. Galazi Lumber & Constr. Co., 152 F.3d 729, 733-34 (7th Cir. 1998) (compensatory); Lindsey v. Am. Cast Iron Pipe Co., 810 F.2d 1094, 1102 (11th Cir. 1987) (punitive), and they are available up to the amount of back pay for willful violation of the EPA or the ADEA. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985). A violation is willful when (1) an employer knew its conduct was prohibited by the law or (2) an employer showed a “reckless disregard” for whether it was prohibited. Id.

Under the ADEA, the court must award liquidated damages once the plaintiff established that the employer’s willful violations. See Tyler v. Union Oil Co. of Cal., 304 F.3d 379, 398 (5th Cir. 2002). The ADEA allows an award of damages only for pecuniary benefits connected to the job, but not for compensatory damages for mental anguish, pain, suffering, humiliation, and loss of employment. Collazo v. Nicholson, 535 F.3d 41, 44-45 (5th Cir. 2008).

However, under the EPA, the court may not award liquidated damages if the employer can prove that its act or omission was in good faith and that it had reasonable grounds to believe it did not violate the EPA. See Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 357 (4th Cir. 1994). The EPA allows an award of damages for mental and emotional distress for violation of its anti-retaliation provisions. Moore v. Freeman, 355 F.3d 558, 563 (6th Cir. 2004).

(iv) The ADA & The Rehabilitation Act

The ADA allows compensatory and punitive damages except in reasonable accommodations cases where the employer has made a good faith, although ultimately unsuccessful, effort to reasonably accommodate the employee with disabilities in consultation with the employee seeking the accommodation. 42 U.S.C. § 12117(a); 42 U.S.C. §

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

1981a(a)(3). Also, some courts held that compensatory and punitive damages are unavailable for a retaliation claim brought under the ADA. Alvarado v. Cajun Operating Co., 588 F.3d 1261, 1265 (9th Cir. 2009); Kramer v. Banc of Am. Sec., L.L.C., 355 F.3d 961, 965 (7th Cir. 2004); Bowles v. Carolina Cargo, Inc., 100 F. App'x 889, 890 (4th Cir. 2004).

(b) **Compensatory Damages**

In order to recover compensatory damages, the plaintiff must submit proof of actual non-economic injuries, such as emotional distress, pain and suffering, or harm to reputation, caused by the employer's unlawful conduct. Carey, 435 U.S. at 264; see Patterson, 90 F.3d at 936 (concluding that Title VII's standard of proof to establish compensatory damages is comparable to the Section 1981 and 1983 standard to demonstrate emotional distress); see, e.g., Williams v. Pharmacia, Inc., 137 F.3d 944, 953-54 (7th Cir. 1998) (affirming award of \$ 250,000 compensatory damages in lost future earnings and diminished professional standing as a result of termination).

Damages for emotional distress must be supported by competent evidence of genuine injury, but medical evidence is not necessary. Heaton v. Weitz Co., 534 F.3d 882, 891 (8th Cir. 2008); see Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 339 F.3d 52, 63-64 (1st Cir. 2005) (noting that expert medical testimony is not a prerequisite for an emotional distress award). The plaintiff's testimony may be sufficient so long as she offers specific facts as to the nature of her claimed emotional distress and as to the causal connection to the employer's alleged violation. Id.; Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 546-47 (4th Cir. 2003). For instance, the Eighth Circuit in Heaton found that the plaintiff's testimony sufficiently supported the jury's award of \$73,320 for emotional distress. 534 F.3d at 885. The plaintiff testified that following his termination, he felt "inadequate" and had no sense of identity; his reputation among his peers was damaged; he went to a psychologist and family counselor for help; and he began taking antidepressant medications, which he was still taking during trial and which had negative side effects including sweating, nausea, and insomnia. Id. at 892-93.

However, as the amount of damages sought increases, the evidentiary threshold becomes more difficult to meet. See Annis v. Cnty. of Westchester, 136 F.3d 239, 249 (2d Cir. 1998) (plaintiff's own testimony alone is insufficient to support award of compensatory damages for emotional distress where no physical manifestations of distress were alleged, no affidavits or other evidence corroborated claims that the plaintiff attended counseling, and plaintiff remained in her job); Giles, 245 F.3d at 489 (finding that the plaintiff's own testimony insufficient to support the award of \$300,000 for emotional distress). Also, courts will compare an award with that in similar cases in terms of the defendant's conduct, the losses suffered by the plaintiff, and the quality of evidence presented to support the claims for damages. See Thomas v. Tex. Dep't of Criminal Justice, 297 F.3d 361, 363, 370-72 (5th Cir. 2002) (remitting \$100,000 Title VII award to \$50,000 after review of three cases where emotional distress damage awards were remitted to less than six figures). Even when the

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

compensatory damages are found excessive, the Seventh Amendment requires a new trial in order to reduce compensatory damages for a plaintiff who does not accept a remitter. Hetzel v. Cnty. of Prince William, 523 U.S. 208, 211(1998).

The employer is liable for all harms it inflicted upon an eggshell plaintiff. See EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1286 (7th Cir. 1995) (finding award of \$50,000 for emotional distress to terminated employee with terminal cancer not excessive because the emotional burden on a person dying of cancer and unable to provide for his family “is considerably greater than that suffered by the ordinary victim of a wrongful discharge). But the plaintiff cannot recover damages for harm resulting from factors unrelated to the alleged discrimination, such as prior injuries, that have caused emotional distress or other harm. See McKinnon v. Kwong Wah Rest., 83 F.3d 498, 506 (1st Cir. 1996) (affirming the compensatory damages award of \$ 2,500 in sexual harassment case to the plaintiff who had been sexually abused as a child because it was difficult to distinguish between harm caused by childhood abuse and workplace harassment); Malandris v. Merrill Lynch, Peirce, Fenner & Smith Inc., 703 F.2d 1152, 1170 (10th Cir. 1981) (holding that defendant liable for compensatory damages where aggravation of plaintiff’s preexisting emotional distress was a foreseeable consequence of defendant’s conduct); Smith v. Monsanto Co., 9 F. Supp.2d 1113, 1118-19 (E.D. Mo. 1998) (finding excessive \$500,000 emotional distress award, which failed to account contribution of unrelated personal problems to emotional distress).

(c) **Punitive damages**

Punitive damages are available for disparate treatment cases under Title VII, the ADA, and Sections 1981 and 1983 when the employer is found to discriminate the plaintiff “with malice or with reckless indifference.” 42 U.S.C. § 1981a(b); Smith, 461 U.S. at 56.

On the other hand, punitive damages are unavailable under the Rehabilitation Act, and in some circuits, in pattern or practice cases under Title VII. See Allison v. Citgo Petroleum Corp., 151 F.3d 402, 415, 417 (5th Cir. 1998) (compensatory and punitive damages involve unique individual issues and thus ability to recover such damages requires proof of individual injury).

To recover punitive damages, the plaintiff must successfully impute liability to the employer for the alleged unlawful discrimination. Kolstad v. Am. Dental Ass’n, 527 U.S. 526, 539-46 (1999). Also, the plaintiff need to show that the defendant engaged in discriminatory conduct with the knowledge that it might be in violation of federal anti-discrimination law; the plaintiff need not show that the employer engaged in egregious or outrageous acts. Kolstad, 527 U.S. at 536-40. The plaintiff does not need to demonstrate the defendant’s actual knowledge that the defendant’s action would violate federal anti-discrimination law; the defendant’s perceived risk that federal law may be violated is sufficient. See EEOC v. Harbert-Yeargin, Inc., 266 F.3d 498, 513 (6th Cir. 2001).

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

Employer conduct or decisions that were so clearly based upon unlawful factors that a statutory violation was obvious, the employer's persistent failure to remedy a situation in which an employee's rights were being violated, or other conduct that is extremely offensive demonstrates sufficient indifference to a plaintiff's rights give rise to a risk of an award of punitive damages. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2004) (stating that the defendant who repeatedly caused physical harm on the financially vulnerable victim despite the potential implication on the health or safety of others is likely found acting with an indifference to or a reckless disregard).

For example, in EEOC v. Fed. Express Corp., the Fourth Circuit affirmed the award of \$8000 in compensatory damages and of \$ 100,000 in punitive damages to a hearing-impaired package handler who alleged that his former employer failed to reasonably accommodate him under the ADA. 513 F.3d 360, 363-64 (4th Cir. 2008). The plaintiff was denied the accommodations necessary for him to understand and participate in employee meetings and training sessions on important subjects such as workplace safety, handling dangerous goods, interpreting hazardous labels, and potential anthrax exposure. Id. at 365-68. The court concluded that the award of punitive damages was justified because management, despite their awareness of ADA requirements, was indifferent as to whether their failure to accommodate the plaintiff's disability could jeopardize his safety and potentially implicate the safety of others. Id. at 373-73.

The reasonableness of punitive damage award was determined by considerations of the following factors: (1) degree of reprehensibility of the defendant's conduct, (2) disparity between harm suffered and damage award, and (3) difference between damages awarded in this case and comparable cases. State Farm, 538 U.S. at 418. The more reprehensible the defendant's conduct was, the more likely the court will find punitive damages reasonable in order to achieve punishment or deterrence. See id. at 419.

(d) **Defenses**

The employer may (i) avoid compensatory and punitive damages by presenting mixed-motive defense; (ii) avoid punitive damages by presenting good-faith defense; or (iii) reduce punitive damages by presenting due process concerns.

(i) Mixed-Motive Defense

Proof that discrimination was one of the motivating factors in the employer's decision allow the plaintiff to pursue only declaratory relief, injunctive relief, and attorney's fees and costs directly attributable to pursuing the claim. 42 U.S.C. § 2000e-5(g)(2)(B). Employers may limit compensatory and punitive damages by presenting evidence that the same action would have been taken regarding the plaintiff's employment even in the absence of a discriminatory motive.

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

(ii) Good-faith defense

When the discriminatory action was committed by an employer's "managerial agent," the employer may challenge claims for punitive damages by demonstrating that the employer made good faith efforts to comply with anti-discrimination laws. See Kolstad, 527 U.S. at 545 ("[I]n the punitive damages context, an employer may not be vicariously liable for discriminatory employment decisions of managerial agents where such decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'"). In Kolstad, the Supreme Court held that where an employer has demonstrated that it has made good faith efforts to accommodate a person with disabilities, punitive damages may not be awarded. Id. at 544.

For example, in Dominic v. DeVilbiss Air Power Co., an employee established sexual harassment and retaliation at trial and was awarded \$113,000 in compensatory damages, and \$50,964.51 in attorney fees. 493 F.3d 968, 973 (8th Cir. 2007). Granting the employer's appeal of the punitive damages award, the Eighth Circuit held that punitive damages were not warranted because the employer promptly responded to the plaintiff's harassment complaint with good-faith efforts. Id. at 976. The employer had a zero-tolerance sexual harassment policy, and initiated four investigations into the plaintiff's complaint against his supervisor. Id. at 974. The employer also hired outside employment law specialists, who determined the employer's internal investigations were proper and thorough. Id. at 974-75.

(iii) Due process concerns

The employer may challenge awards of punitive damages on due process grounds when the ratio of the amount of compensatory to that of punitive damages awarded to the plaintiff is more than a single digit. See State Farm, 538 U.S. at 425 (stating that "few awards exceeding a single-digit ratio between compensatory and punitive damages will satisfy due process"). Nevertheless, under Title VII, punitive damages can be awarded even in the absence of compensatory damages. Tisdale v. Fed. Express Corp., 415 F.3d 516, 535 (6th Cir. 2005) (dismissing constitutional concern); Cush-Crawford v. Adchem Corp., 271 F.3d 352, 359 (2d Cir. 2001); Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010-11 (7th Cir. 1998).

In harassment cases, the employer should pay close attention to jury instruction regarding the basis of punitive damages. In Phillip Morris v. Williams, the Supreme Court held that the Due Process forbids basing a punitive damage award on conduct that did not affect the plaintiff. 127 S. Ct. 1057, 1063 (2007). The Court drew a line between allowing evidence of the defendant's similar conduct to nonparties to show the reprehensibility of the defendant's conduct to the plaintiff and allowing that same evidence to serve as the basis of the punitive damages award. Id. at 1064. In fact, in Williams v. ConAgra Poultry Co., the Eighth Circuit remitted an award of punitive damages to an individual Title VII plaintiff that was based, in part, on proof of the defendant's discriminatory conduct toward other employees. 378 F.3d 790, 797-98 (8th Cir. 2004)

**TYPES OF DAMAGES AVAILABLE IN
EMPLOYMENT CASES**

3. Injunctive & Affirmative Relief

Injunctive and affirmative relief is an equitable relief that the court may grant to plaintiffs under Title VII, the ADEA, the ADA, and the Rehabilitation Act.

(a) Injunction against the use of specific, unlawful employment practices

Courts have enjoined the use of specific, discriminatory employment practices, which include but not limited to height and weight requirements, scored tests, educational requirements, and age limits, as well as ordered affirmative measures to remedy unlawful practices. The scope of a prohibitory injunction is determined by the scope of the conduct found unlawful.

Where there is evidence of consistent past discrimination, the employer may avoid the entry of injunctive relief by establishing that further noncompliance is unlikely. EEOC v. Hacienda Hotel, 881 F.2d 1504, 1519 (9th Cir. 1989); Cox, 784 F.2d at 1561. As such, the employer may show that (i) its discrimination ceased well before the entry of judgment, *see, e.g., Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. 1990) (affirming denial of injunctive relief because defendant ceased challenged practice of paying “head of household” salary supplement to be in compliance with the EPA), (ii) the plaintiff or the perpetrator is no longer employed by the defendant and is unlikely to be reinstated, *see, e.g., Cardenas v. Massey*, 269 F.3d 251, 265 (3d Cir. 2001) (denying injunction requiring employer to implement specific antidiscrimination policies because plaintiff no longer employed); Spencer v. Gen. Elec., 894 F.2d 651, 660-61 (4th Cir. 1990) (affirming denial of injunction against sexual harassment where harassing supervisor was no longer employed and company had implemented comprehensive policy against sexual harassment), or (iii) injunctive relief is unnecessary to prevent future noncompliance. But courts nevertheless retain the power to enter injunctive relief when it determines that injunctive relief is necessary to provide a complete remedy and prevent recurrence. *See United States v. Gregory*, 871 F.2d 1239, 1246 (4th Cir. 1989) (noting that district court has authority to grant injunctive relief even after unlawful practices apparently have ceased)

(b) Make-whole remedies

When discrimination is found, the court must provide the plaintiff with a make-whole relief to restore her as nearly as possible to the position she would have occupied absent the discrimination. Albemarle Paper, 422 U.S. at 418. The burden of limiting the remedy rests with the defendant. Smallwood v. United Airlines, Inc., 728 F.2d 614, 615 n.5 (4th Cir. 1984).

Specific make-whole remedies include hiring, transfer, promotion, reinstatement, retroactive seniority, tenure, restoration of benefits, salary adjustment, expunging adverse material from personnel files, letters of commendation, and reasonable accommodation. *See, e.g., Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1214 (2d Cir. 2003)

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

(affirming award of promotion with commensurate salary increase as equitable relief); Ralph v. Lucent Techs., Inc., 135 F.3d 166, 172 (1st Cir. 1998) (affirming award of accommodation permitting employee to work part-time on temporary basis); Hartman v. Duffey, 88 F.3d 1232, 1239 (D.C. Cir. 1996) (ordering set number of slots to be filled by job applicant members); In re Pan Am. World Airways, Inc., 905 F.2d 1457, 1460, 1464-65 (11th Cir. 1990) (ordering reinstatement for flight attendant discharged because of unlawful pregnancy policy); Harrison v. Dole, 643 F. Supp. 794, 795, 797 (D.D.C. 1986) (ordering transfer to position with greater potential for upward mobility); EEOC v. Rath Packing Co., 787 F.2d 318, 334-35 (8th Cir. 1986) (reversing denial of retroactive seniority to victims of hiring discrimination, even though such remedy would require bumping long-term employees to inferior jobs and could impair employee morale).

A court may give “make-whole” relief only to actual victims of discrimination, and may not order those remedies to an individual who was not an actual victim, even if the defendant could have given that relief voluntarily. Fire Fighters Local 1784 v. Stotts, 467 U.S. 561, 576 n.9 (1984). The provision does not preclude a consent decree that benefits persons who were not actual victims of discrimination. Fire Fighters Local 93 v. City of Cleveland, 478 U.S. 501, 515 (1986).

(i) Retroactive Seniority

Retroactive seniority for victims of discrimination in hiring is a presumptively correct remedy and can only be denied in unusual circumstances. Franks v. Bowman Transp. Co., 424 U.S. 747, 780 n.41 (1976). Adverse impact on “other, arguably innocent, employees” is not a reason to deny such relief. Id. at 774.

(ii) Reinstatement

Although reinstatement is a preferred remedy in cases of discriminatory discharge, it will not be ordered where it would produce excessive hostility. See infra 1(b) Front Pay. Reinstatement is inappropriate when:

- Some intervening nondiscriminatory event would have ended the plaintiff’s employment, see, e.g., McKennon, 513 U.S. at 361-62 (holding that after-acquired evidence of misconduct bars prospective relief); Neufeld v. Searle Labs., 884 F.2d 335, 342 (8th Cir. 1989) (holding that employer can avoid award of reinstatement by proving that “some new development—such as a reduction in the sales force or termination of operations—would have ended [plaintiff’s] employment”);
- Substantial changes in the company have made reinstatement impracticable, see, e.g., Kelewae v. Jim Meagher Chevrolet, Inc., 952 F.2d 1052, 1055 (8th Cir. 1992) (holding that current adverse financial

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

position of defendant militated against award of reinstatement or front pay); Williams v. Pharmacia Ophthalmics, Inc., 926 F. Supp. 791, 795 (N.D. Ind. 1996) (declining to order reinstatement in light of pending merger and reorganization, which would result in elimination of plaintiff's position);

- The employer in a mixed-motive case proves that it “would have taken the same action in the absence of the impermissible motivating factor,” 42 U.S.C. § 2000e-5(g)(2)(B) (in mixed-motive cases, courts may grant attorney's fees, declaratory relief, and injunctive relief, except orders requiring any admission, reinstatement, hiring, or promotion);
- The plaintiff is not capable of performing the job in question; see, e.g., Thurman v. Yellow Freight Sys., 90 F.3d 1160, 1171-72 (6th Cir. 1996) (affirming denial of reinstatement where plaintiff injured himself and was unable to do heavy lifting required for the position); or
- The relief sought would place the plaintiff in a better position than she would have occupied in the absence of discrimination. See, e.g., McKnight v. Gen. Motors, Inc., 973 F.2d 1366, 1370-71 (7th Cir. 1992) (affirming denial of reinstatement where plaintiff sought placement in different job and relocation in new city).

The plaintiff generally will not be reinstated until the next job becomes available because “relief for actual victims does not extend to bumping employees previously occupying jobs,” and the employer is responsible for back pay or front pay until that time. See Fire Fighters Local 1784 v. Stotts, 467 U.S. 561, 579 n.11 (1984); Briseno v. Cent. Technical Cmty. Coll. Area, 739 F.2d 344, 348 (8th Cir. 1984) (holding that plaintiff is entitled to monthly payments until placed in comparable position). However, bumping may be permissible when the employer has exhibited bad faith. See Lander v. Lujan, 888 F.2d 153, 156 (D.C. Cir. 1989) (bumping is permissible when employer discriminates against the plaintiff by denying her placement in a unique, high-level job that has no reasonable substitute); Spagnuolo v. Whirlpool Corp., 717 F.2d 114, 121 (4th Cir. 1983) (bumping is permissible to remedy employer's noncompliance with judgment awarding the plaintiff the next available vacancy by awarding subsequent positions to other individuals).

(c) **Preliminary injunctions**

Preliminary injunctive relief may be ordered to preserve the status quo pending the outcome of litigation, while permanent injunctive relief may be ordered to prevent further violations. Plaintiff must show (1) a strong likelihood of success on the merits, (2) the presence of irreparable injury to the plaintiff, (3) harm to others, and (4) whether the public interest will be furthered by issuing an injunction.

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

An employee's retaliatory action that has a chilling effect on the employee's ability to exercise her own rights is sufficient to show irreparable injury, but loss of a job or job opportunity is not. See Cox v. City of Chi., 868 F.2d 217, 223 (7th Cir. 1989) (delay in promotion not irreparable harm); Marxe v. Jackson, 833 F.2d 1121, 1125-28 (3d Cir. 1987) (plaintiff can show irreparable harm where retaliatory discharge threatens plaintiff's ability to prove her case by intimidating potential witnesses); Castro v. United States, 775 F.2d 399, 408 (1st Cir. 1985) (termination from job not irreparable harm). Courts differ whether financial hardship, humiliation, emotional distress, damage to reputation, or diminished ability to obtain other employment is sufficient to demonstrate irreparable injury. Compare Stewart v. U.S. Immigration & Naturalization Serv., 762 F.2d 193, 199-200 (no), with EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984) (yes).

4. Attorney's Fees

Reasonable attorney's fees are available to a prevailing party under Title VII, the ADEA, the EPA, the ADA, and the Family and Medical Leave Act ("FMLA"). Only the prevailing party, not the party's attorney, has standing to seek attorney's fees under § 1988 or Title VII. Neither a lawyer who represents herself in a successful civil rights action nor pro se plaintiff may recover attorney's fees. See Kay v. Ehrler, 499 U.S. 432, 435-38 (1991); Hawkins, 163 F.3d at 694-95.

(a) **Who Is a Prevailing Plaintiff?**

Absent unusual circumstances, "prevailing" plaintiffs are entitled to reasonable attorneys' fees. Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). To recover attorney's fees, the plaintiff must demonstrate that she is a prevailing party, who has succeeded on a "significant issue" and obtained some of the relief sought, which "materially alters the legal relationship between the parties." See Farrar v. Hobby, 506 U.S. 103, 104 (1992); Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791-93 (1989). The plaintiff must receive the damages of some significance relative to what was sought in the case or nonpecuniary relief that secures important statutory or constitutional rights on behalf of the plaintiff or the public at large. See Karraker v. Rent-A-Center, Inc., 492 F.3d 896, 899-900 (7th Cir. 2007) (holding that plaintiffs who obtained an injunction that ordered employer to discard the plaintiffs' personality test results were prevailing party because the injunctive relief had value to them); Champion Produce, Inc. v. Ruby Robinson Co., Inc., 342 F.3d 1016, 1025 (9th Cir. 2003) (holding that plaintiff was not the prevailing party where its recovery was relatively small compared to the damages sought); Pedigo v. P.A.M. Transp., Inc., 98 F.3d 396, 398 (8th Cir. 1996) (holding that legal relationship between parties unaltered despite declaration that plaintiff was discriminated against by employer under ADA because plaintiff no longer worked for the employer).

A party prevails only when she obtained relief in a judgment or in a settlement enforced by a court through a consent decree, not when she achieved the desired result by the voluntary change of other party as a response to her lawsuit. Buckhannon Bd. & Care Home,

TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES

Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 601, 603 (2001); e.g., Bill M. v. Nebraska Dep't of Health & Human Res., 570 F.3d 1001 (8th Cir. 2009) (holding that plaintiffs who obtained desired relief through a settlement agreement are not prevailing parties because the court did not retain jurisdiction over the settlement agreement or give any indication of approval or disapproval). But see Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1135 & n.5 (9th Cir. 2002) (holding that a party to a legally enforceable private settlement agreement is a prevailing party; disposing Buckhannon as mere dicta). Furthermore, a party is not a "prevailing party" if a preliminary injunction she initially obtained is "reversed, dissolved, or otherwise undone by the final decision in the same case." Sole v. Wyner, 127 S. Ct. 2188, 2195-96 (2007).

(b) **Grounds for Denying Awards for Attorneys' Fees**

The defendant carries the burden to show special circumstances that warrant the denial of attorney's fees to a prevailing plaintiff. Although the award of nominal damages may accord the plaintiff a "prevailing" party status, the court may nevertheless deny the award of attorney's fees. See Farrar, 506 U.S. at 113-115; cf. Pino v. Locascio, 101 F.3d 235, 239 (2d Cir. 1996) (holding that attorney's fees and costs are not appropriate when plaintiff recovered only nominal damages). Under the ADEA, Attorney's fees are unavailable in mixed-motive cases, because the statutory scheme of the FLSA requires a final judgment in favor of the plaintiff. See Donovan v. Dairy Farmers of Am., Inc., 53 F. Supp.2d 194, 198-99 (N.D.N.Y. 1999). But see Costa v. Desert Palace, 299 F.3d 838, 850 (9th Cir. 2002), aff'd on other grounds, 539 U.S. 90 (2003) (holding that in a mixed-motive case, the plaintiff can still obtain attorneys' fees even though the employer is not liable for damages under Title VII).

(c) **Prevailing Defendants**

The defendant may receive an award of attorney's fees after prevailing in a suit under Title VII or § 1988 if the court found that the plaintiff's claim was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith" or that the "plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). In determining whether the plaintiff's claim is frivolous, unreasonable, or without foundation, the Eleventh and Third Circuits have identified three factors: (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits. It is unlikely for the defendant to recover attorney's fees when (1) the plaintiff's claims have survived summary judgment; (2) the plaintiff has established a prima facie case of discrimination, or (3) the plaintiff received a right-to-sue letter from the EEOC, even if the defendant ultimately prevails.

Under the ADEA, the defendant only received an award of attorney's fees when the plaintiff was found to have brought suit in bad faith. See Medina v. Ramsey Steel Co., Inc., 238 F.3d 674, 686 (5th Cir. 2001).

**TYPES OF DAMAGES AVAILABLE IN
EMPLOYMENT CASES**

(d) **Calculating Attorney's Fees Awards**

(i) The Lodestar Method

Attorney's fees are computed by using the lodestar, which consists of multiplying the number of hours that could reasonably have been expended on the case by a reasonable hourly rate. Hensley, 461 U.S. at 433. In determining the appropriate hourly rates as well as the appropriate number of hours, courts consider factors such as the amount of time and work required by the case, the degree of skill or experience required by or exhibited in litigating the case, the fees customarily charged by attorneys with similar experience, the amount of fees awarded in comparable cases, the amount of redundancy or waste apparent in the attorneys' time records, and the desirability of the representation. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717, 719 (5th Cir. 1974); see, e.g., Barnes v. Cincinnati, 401 F.3d 729, 746-47 (6th Cir. 2005) (concluding the district court's use of a multiplier of 1.75 to increase the award of attorney's fees reasonable because of the "novelty and difficulty" of the case and because of the great skill required to conduct the case properly).

The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Inadequate documentation may be a basis for the reduced fee. See Kirsch v. Fleet St., Ltd., 148 F.3d 149, 173 (2d Cir. 1998) (20 percent reduction of fees in ADEA case due in part to inadequate record).

(1) Rates

The hourly rate is generally determined through a survey and comparison of rates among the community of attorneys in the court's jurisdiction with comparable experience, often by referring to rates appearing in similar cases within the jurisdiction. See Blum v. Stenson, 465 U.S. 886, 888 (1984).

(2) Hours

"When the facts and legal theories overlap . . . and when the prevailing party pursued alternative legal theories in good faith, rejection of one theory 'is not a sufficient reason for reducing a fee.'" Sturgill v. United Parcel Serv., 512 F.3d 1024, 1036 (8th Cir. 2008) (quoting Hensley, 461 U.S. at 434). Courts will disallow time viewed as duplicative or otherwise unnecessary or wasteful. See Stark v. PPM America, Inc., 354 F.3d 666, 674 (7th Cir. 2004); see, e.g., Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1258 (10th Cir. 2005) ("Time spent reading background material designed to familiarize an attorney with an area of law is presumptively unreasonable."). Attorney's fees for work done in connection with administrative proceedings may be awarded if the "proceedings are part of or followed by a lawsuit." N.C. Dep't of Transp. v. Crest St. Cmty. Council, 479 U.S. 6, 14-15 (1986). Fees connected to the preparation of an attorney's fee application are also considered a legitimate portion of an award of attorneys' fees. See Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1183-84 (2d Cir. 1996).

**TYPES OF DAMAGES AVAILABLE IN
EMPLOYMENT CASES**

(ii) Adjustments to the Lodestar

Courts consider the degree of success of the prevailing party in adjusting awards of attorneys' fees. Contingent fee arrangements between plaintiffs and their attorneys do not limit the amount of attorneys' fees that may be recovered in connection with a case. See Blanchard v. Bergeron, 489 U.S. 87, 96 (1989). Nor does the risk of loss inherent in contingent fee arrangements serve the basis to enhance the amount of attorneys' fees. City of Burlington v. Dague, 505 U.S. 557, 562-63 (1992).

The award of attorney's fees may also be truncated by the plaintiff's rejection of a reasonable offer of settlement. See Marek v. Chesny, 473 U.S. 1, 10-11 (1985). Under the Federal Rules of Civil Procedures 68, the fees awarded to the plaintiff may be limited to fees related to work done prior to an offer to allow a consent judgment for a particular amount to be entered against the defendant, if the final judgment obtained by the plaintiff is not more favorable than the defendant's offer. See id. at 9.

(e) **Tax Issues Regarding Awards of Attorney's Fees**

A contingent fee agreement should be viewed as an anticipatory assignment to the attorney of a portion of the client's income from any litigation recover, regardless of the speculative nature of the legal claim's ultimate value. Comm'r v. Banks, 543 U.S. 426, 434 (2005). The portion of a litigant's recovery later paid as a contingent fee should be treated as income to the litigant regardless of any state laws granting attorneys a superior lien on the contingent-fee portion of the recovery. Id.